United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1350

To be argued by
LAWRENCE STERN

B 7cc
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee :

-against- :

Docket No.
75-1350

PETER EVANS,
Defendant-Appellant

AN APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

BRIEF FOR DEFENDANT APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, X
Appellee
:
-against- : Docket No. 75-1350

PETER EVANS,
Defendant-Appellant X

ISSUES PRESENTED

1. Whether the admission in evidence of the irrelevant, immaterial hearsay statements of the judge who sentenced the "accomplice" witness and of the United States Attorney who prosecuted him, vouching for the witness' cooperation, character, and truthfulness, and expressing belief in appellant's guilt, deprived appellant of his sixth and fifth amendment rights to cross-examination and fair trial.

2. Whether the Court's preclusion of cross-examination into the details of the informant co-conspirator witness' drug dealer way of life and means of support, his psychiatric history and mental capacity, and the effects of his drug use on his perceptions, deprived appellant of his rights to cross-examination and fair trial.

3. Whether the admission in evidence of an uncharged LSD conspiracy, which allegedly occurred four years prior to the indicted cocaine charges, in a case where the only issue was the credibility of the government informant, was prejudicial error depriving appellant of a fair trial.

4. Whether the Court's charge which merged and confused reasonable doubt with presumption of innocence, which instructed as a fact that Thomas Evans was an accomplice, which advocated the government's use of accomplice testimony, and which called cocaine a narcotic drug, was erroneous.

5. Whether Appellant was deprived of a fair trial by reference to cocaine as a "narcotic drug" in the indictment, the government's opening statement and the Court's charge to the jury.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Motley,J) rendered on September 22, 1975, convicting appellant of conspiracy (21 U.S.C. §846) and possession with distribution intention of 39.08 grams of cocaine (21 U.S.C.§§812, 841 (a)(1), 841 (b)(1)(A); 18 U.S.C. §2), and sentencing him to concurrent, suspended prison terms of three years with three years probation.

Timely notice of appeal was filed, and this Court assigned Irving Cohen as counsel on appeal.

B. STATEMENT OF FACTS

An indictment filed February 5, 1973, charged appellant, Deborah Ann McKinney and Thomas Evans with conspiracy to possess and distribute "narcotic drug controlled substances," and with the possession with distribution intention on September 22, 1972, of a, "narcotic drug controlled substance," 39.08 grams of cocaine. Thomas Evans, a co-indictee and no relation to appellant, pleaded guilty and testified for the government against appellant, who was tried alone on August 15, 18, and 19, 1975.

Prior to the start of the trial, the Court ruled that the defendant could not use for any purpose, and could not see, three separate psychiatric records concerning the government

informant witness, Thomas Evans. The Court sealed the three items and marked them Court's Exhibits 1,2 and 3, records of Mount Sinai Hospital, records of the Fifth Avenue Center for Counseling and Psychotherapy and records of the Long Island Jewish Hillside medical Center in Glen Oaks, New York, respectively. (Unsealed by subsequent order of the trial Court for purpose of delivery to this Court for its perusal on the appeal.) Thomas Evans had been hospitalized in 1967 and 1968 at Mount Siani and Long Island Jewish Hillside, and, beginning in January, 1973, at the Fifth Avenue Center as part of his probation requirements (7-8*). The Court ruled the records had no bearing on the witness' credibility (3-6).

The Court also ruled that the government would be permitted to prove against appellant an uncharged 1968 LSD transaction between him and Thomas Evans (8-13).

> The defendant in this case is charged with possessing cocaine with intent to distribute. He has entered a plea of not guilty...He has therefore put in issue his intent...Therefore, your objections to the admissibility of that evidence are overruled.
>
> (11-12)

The Court also overruled defense objection to the word "narcotic" in the indictment and as reiterated by the United States Attorney in his opening statement. Counsel moved to strike the word in both instances and to bar its use in the

*Numerical references are to the "rghr" page numbers in the minutes of trial (upper left corner of the pages)

Courtroom, because, "pharmacologically that is not correct and I believe letally (sic) it is not correct" (21). At the end of the trial, the Court spoke again to this matter.;

> The question has been raised in other circumstances and apparantly there is a District Court ruling in the circuit on that issue...The Court concluded that a listing of cocaine as a narcotic drug had some reasonable basis...that's a matter that could have been taken up perhaps before the trial,but in any event there was certainly no evidence offered here that cocaine is not a narcotic drug as defined by statue. (286-287)

The trial began with the testimony of Thomas Evans, 28 years old and high school educated (34). He began cooperating with the government upon hi arrest on September 23, 1972. The United States Attorney promised that the cooperation would be made known to the sentencing judge (57-58). He pleaded guilty to one count of the instant indictment and was sentenced to a two year suspended prison term and three years probation. Sometime thereafter, he was told by the government that his probation period would be dropped and his conviction set aside (59-106), and on July 26, his conviction was indeed set aside pursuant to the Youth Corrections Act (108). In the three weeks prior to trial Evans (hereafter Thomas Evans will be referred to as Evans; Appellant, Peter Evans,will be referred to as Appellant) had seen the United States Attorney ten or twelve times; the AUSA had a list of questions, and any errors in Evans' answers were corrected (84-86).

Evans further testified that during the late sixties in the lower East Side of Manhattan, where he lived, drug use was fairly prevalent and he tried a great variety of drugs, including mescaline, peyote, marijuana, hashish,heroin, amphetamines and barbiturates (69). In 1968, he sold LSD and marijuana (80-81). During the years 1965-1972, he travelled all over the United States, from coast to coast, yet his only employment during that period was a six week stint in a book store (71-74). His girlfriend Amy lived with him in the later years, but her only employment was as a camp counselor in the summer of '72 (92). Marijuana was seized from his apartment; he stopped all drug use after his arrest (70-71).

In the latter part of 1968, he lived on East 3rd Street. He knew appellant at that time. Appellant lived near 84 East 3rd Street and was employed by a newspaper and belonged to the mailers union (35-36 ,104). In the late summer or fall of 1968, Evans had a conversation with appellant in appellant's apartment. * Appellant told Evans he'd gotten some good LSD from the Coast, and he invited Evans to sample it (37). Evans sampled it and later sold some tabs given him by appellant, returning some of the money from the sale to appellant. Appellant said the tab's were available in singles or 25's. Evans sold the LSD "very briefly" (38). He didn't make much money (39).

*Counsel renewed his objection to this evidence (36)

Four years later, in the middle of September, 1972, Evans, who was then living in apartment 22 at 17 St. Marks Place with his girlfriend Amy Wachtel, had a second conversation with appellant in the latter's apartment at 324 East 6th Street (34-35, 39-40). Appellant told Evans he had cocaine, and they both snorted it. Two days later, appellant called Evans and invited him to come over. Evans went to appellant's apartment. There, appellant asked Evans to keep the cocaine in Evans' apartment on St. Marks Place. Appellant explained that there was no danger involved, but he was "a little nervous" that his apartment was "hot" (41,40-41). In return for Evans' service in holding the cocaine, which service he agreed to give, appellant would give Evans some cocaine for his personal use and pay Evans' rent.(41) That same evening, appellant brought to Evans' apartment a clear plastic bag the size of a grapefruit and said, "here it is" (42-43). If the powder inside the package was cocaine, it was worth more than $1000 (95). Evans put the package behind some records in his livingroom(43). Appellant also gave Evans a small tinfoil packet for Evans' personal use. Appellant asked for keys to the apartment (44).

Appellant returned to the St. Marks Place apartment the next day, and Evans gave him a set of keys. Appellant gave Evans a scale and asked to have the cocaine. Evans took out the cocaine and handed it to appellant who in turn removed a smaller bag from inside the larger one and handed the original

bag back to Evans who put it back behind the records. Evans put the scale in the bedroom (45). A scale, identified in Court as looking like the same scale, was received in evidence over objection (45-46).

That same night, Evans removed the cocaine from behind the records and put it in a miscroscope box which he placed under a floorboard in the bedroom (47-48). Over objection, he was permitted to testify that he told his girlfriend Amy he was keeping the cocaine for appellant and it was under the floorboard. (50-51).

The next day, or two days later, appellant returned to Evans' apartment with a woman named Debbie. Amy was also present in the apartment. Evans removed the cocaine in the presence of appellant and Debbie; appellant weighed a small packet on the scale, and Evans put the large bag back under the floorboard. He gave appellant a small palette knife with which to measure the cocaine (49-52).

The next day, or two days later, appellant and Debbie returned, said they wanted the cocaine, went into the bedroom for five minutes, and left the apartment. Evans went into the bedroom and saw white powder on the scale and on the palette knife (53-54).

The next day, or two days later, which was two days prior to his arrest on September 23, 1972, appellant and Debbie returned. Evans told them to be careful not to leave any dust on

the scale or knife. They went into the bedroom and in a few minutes they came out and left the apartment (55-57). This was the substance of Evans' testimony.

The trial Court expressed impatience with defense counsel's cross-examination of Evans. During that part of the cross-examination where counsel was trying to establish, through Evans extensive travels despite the lack of legitimate employment, that Evans was a major drug dealer, the Court interrupted.

> Approach the bench, Mr. Gold...Do you mind telling me what the relevance of all these details are... (74)...you can bring out, if you can, that he is a major drug dealer, but the detail into which you are going is not relevant at all (75)...I am precluding you from going into some very minute detailed, description of this man's activities. The jury has a right to wonder as I do how this is relevant and whether or not it is wasting time...we don't need these utter details (76).

The Court sustained objection to the question, "How would you describe, if you can sir, what the effect of the LSD was upon you for the bulk of your trips?" (77). The Court sustained objection to the following questions ruling, "You cannot go into this area so don't ask any more questions about psychiatric treatment." (89).

> Mr. Evans, during this period from '65 to '72 did you spend any time in a hospital? (77-78)*

*Counsel argued:"I was under the impression I was being precluded from the use of the records themselves, the physical use of the records. I didn't think - It's beyond my candor that I would be excluded from going into treatment for mental illness during the course of cross-examination of a witness. I feel I am being hamstrung by not having the hospital records, but I am willing to proceed and ask the straight questions"(78).

Mr. Evans, from 1965 to the present time have you ever been under the care of a physician for any psychiatric problem?
(79)

Did you ever discuss with them [the AUSA] the possibility of being cross-examined with regard to hospitalization?
(88)

Did you ever discuss with them the possibility of being cross-examined with regard to psychiatric treatment on an out-patient basis?
(88)

Toward the end of the cross-examination of Evans, the following questions and answers and colloquy occurred.

Q: I would assume somewhere along the line Mr. Mukasey told you, that was the Assistant you dealt with...indicated to you that things would be better for you if you cooperated with the government, is that correct?

A: Yes...

Q: And somewhere along the line they indicated to you that even that probation might be shortened, right?

A: Yes.

Q: When for the first time did you know that you would be testifying in this case for real?

A: Maybe three or four weeks ago.

Q: Was that at about the time when they indicated that they would terminate your probation, at about the same time?

THE COURT: Who is they, Mr. Gold?

MR. GOLD: The government.

MR. VIRELLA: Who is the government? Is it the Probation Department or the U.S. Attorney's office.

THE COURT: The question isn't clear, Mr. Gold. Who do you mean by they?

Q: Did there come a time when you were told that your probation would be terminated favorably for you?

A: Yes, there was.

Q: And as a matter of fact didn't they indicate to you that the entire conviction would be set aside?

A: Yes.

Q: As a matter of fact-----

(105-106)

At this point the United States Attorney asked for a side bar and stated to the Court that Evans had been sentenced as a young adult offender, "if that be some kind of explanation as to to whatever the term means of wiping off his conviction" (106). Counsel replied that this was a matter for redirect. The Court then expressed an interpretation of counsel's questions totally unintended by him and nowhere present in the questions themselves.

> What you are bringing out is that the Court was somehow involved in this, the judge and his reducing his sentence as a part of an agreement with the government which I am sure is probably not true... You shouldn't lead the jury to believe that judges are involved in making deals with people who testify for the government unless you have some direct proof of that.
>
> (107)

Because of this interpretation of counsel's questions, the Court permitted the United States Attorney on redirect to read into the record Judge Ward's statements to Thomas Evans during

the sentencing of Evans on his guilty plea on May 4, 1973. These statements included the following:

> You are an intelligent and extremely able young man. I would say from your IQ... you are a person who has potential (110) ...you have not realized that potential, but I would be optimistic enough to think you are still young enough (110-11)...I believe that by admitting what you did by testifying as you did you deserve consideration. ...I hope that you can recognize that there are people in this society who may take advantage of you. You must recognize those and not permit them to do that.
>
> (112-113)

Counsel objected to all of this on grounds of irrelevance (111) and on grounds of improper vouching and hearsay (112): "I just don't think he has the right to laud the character of this witness through Judge Ward's statements by culling out the parts he wants to read." (112). The Court overruled these objections and adopted the United States Attorney's argument that the Judge's statements were relevant because,

> There is background. He has tainted the judiciary in his cross-examination of the defendant [SIC] , he has tainted the office of the United States Attorney that something improper was done and we have a right to present this to the jury so they get a full and complete picture.
>
> (111-112)

Then, the Court went further and, after the government had rested its case, permitted the government to reopen to introduce into evidence the minutes of the entire sentence proceedings of Thomas Evans on May 4, 1973 (175-179). Defense objections were, of course, overruled.

In his summation to the jury the prosecutor argued,

> Mr. Gold will undoubtedly talk about Thomas Evans. Remember one thing. Thomas Evans pled guilty, Thomas Evans admitted his role in the conspiracy, Thomas Evans was sentenced for his wrongdoing and Thomas Evans cooperated. Thomas Evans is not on trial. Mr. Gold is probably going to attack Thomas Evans and accuse him of framing and lying to you and undoubtedly he is probably going to attack the government, that we are also part of this frame-up, but again I ask you please keep your eyes on what the facts in this case are. Thomas Evans has had his day in court. It is now Peter Evans' day in court.
>
> (201)

> Quality proof. He asked for quality proof and he talks about Judge Ward and myself, and Mr. Mukasey - well, why didn't he subpoena Mr. Mukasey? Why didn't he subpoena Judge Ward to testify that there was a deal? Ask ourselves that. Why? Because we submit there was no deal. It is a simple statement. We tell the Court what cooperation the defendant has given the government and the rest is up to the Judge. Again, read those minutes. Notice who objected to the introduction of those minutes. He himself told you. Why? Ask yourselves why.
>
> (225)

One hour into their deliberations the jury asked for, and received in the jury room, the sentence minutes of Thomas Evans (278), minus one clause which the Court ordered deleted: "when and if the person who apparently owned the cocaine and the person who sold it, or a part of it, to an agent, are apprehended" (277). The jury did see the following hearsay testimonials in those minutes, in addition to those already read aloud to them by the prosecutor during the Evans redirect examination (See supra). Assistant United States Attorney Mukasey told Judge

Ward during those proceedings that he had promised Evans he would make a sentence statement on Evans' behalf if Evans cooperated; He told the Judge that Evans had indeed cooperated fully, "as fully as his position in this incident made possible," that Evans had testified in the grand jury and would later testify at trial. (See minutes of May 4, 1973 at p.4). Judge Ward replied that he could sentence Evans to 15 years, but that,

> I do not intend to do that, I believe that by admitting what you did, by testifying as you did, you deserve consideration. (Id at 6)

The Court ordered Evans sentenced as a Young Adult Offender, and Mr. Mukasey explained its significance, "If he successfully proves himself on probation and follows the mandates, to apply to this Court for an exoneration of his record" (Id at 9, 8-9).

Amy Wachtel testified for the government that she was 23 years old and had completed 3 years of college. In September, 1972, she lived with her boyfriend, Thomas Evans, in apartment 22 at 17 St. Marks Place. They rented the apartment together; both their names were on the door. They had been together for one and a half years prior to September of '72 (115-116, 124). She was employed at that time (122).

She was arrested on September 23 at the St. Marks place apartment; the case was dismissed (117, 121).

Seven to ten days prior to the arrest, she had a conversation with Thomas Evans in the apartment. Evans told her he

was holding cocaine as a favor for appellant for a short time. He said that appellant might pay the rent, and he would give appellant a set of keys so he could come and go (117,118, 122). Ms. Wachtel knew the cocaine was under the bedroom floorboard (119). She told Evans to get rid of the cocaine (118).

She saw appellant in her apartment on two occasions, and on one of those occasions he was with Debbie in the bedroom using the scale (120,124).

During this period Ms. Wachtel used marijuana, cocaine, hashish, amphetamines and barbiturates (126-127).

Thomas Dolan, a special agent for the DEA, testified that on September 22, 1972, he went with special agent Kelly to the vicinity of 6th Street and 1st Avenue where an informant introduced the two agents to Debbie (128-130). Debbie asked to see the agent's money, and he showed her $975. Agent Kelly told Debbie he was interested in purchasing three or four more ounces the following week, and Debbie said that would be no problem. She told the agents to wait for her in the park at 7th Street and Avenue A. (130-132).

Agent Dolan went to the park; the time was 5:30 P.M. He waited ten to fifteen minutes,and Debbie returned. He coaxed her into his car for the transfer of the money and cocaine. She took a package from her pants, "out of her belt," and he tested a small quantity of the powder from the package. Upon

seeing a positive reaction, he told Debbie to push the button to open the trunk where he kept the money. When she did that, other surveillance agents converged and arrested Debbie and the agent (133-135).

The agent went to 17 St. Marks Place to execute a search warrant; he went directly to the bedroom floor stash and seized the cocaine. He found some additional cocaine in a bathroom soap dish. The three quantities of cocaine were received in evidence (138-144). Counsel objected that the cocaine sold to the agent by Debbie had no connection to appellant (139).

A stipulation was read to the jury to the effect that a government chemist would testify that the substance sold to the agent by Debbie (GE I) weighed 27.78 grams net and was 85.8% cocaine; that the substance under the bedroom floorboard (GE 2A) weighed 8.35 grams net and was 78% cocaine; and that the substance from the soap dish weighed .15 grams net and was 83.4% cocaine (146-151).

Peter Pallatroni, a DEA inspector, testified that at 5:10 P.M. on September 22, he saw Kelly and Dolan meet with Debbie in the vicinity of 5th and 6th Streets and 1st Avenue. He saw Debbie leave the agents at 5:30 P.M., and he followed her to 324 East 6th Street. He saw her go into the building and come out and walk down 6th Street where he lost sight of her (160-162).

This ended the government's case. After a weekend recess, the government was permitted to reopen to introduce the Thomas Evans sentence minutes (175-179).

Defense motions to dismiss were denied, the Court ruling there was enough non-heresay evidence on the conspiracy count and enough aiding and abetting evidence on the substance count to permit a jury verdict of guilt (180-181).

In addition to the portions of the prosecutor's summation quoted above referring to the sentencing of Thomas Evans, the prosecutor made the following agruments with respect to the 1968 LSD transaction:

> Now let us look at what the government has proved in this case. We have to go back to 1968...A friendship blossomed and during that time Peter Evans gave Tom some LSD. They talked about LSD. They talked about it, they talked about how to sell LSD...He also testified that Peter had gone to California to get LSD. So this friendship, partly based on a drug culture, on a drug relationship, began. That friendship continued into September,1972. That also reminds me of what Humphey Bogart told that inspector in Casablanca, "this looks like the beginning of a beautiful friendship" and that friendship did blossom in 1973 (sic). (192-193)

> You have that relationship that begins in 1968. Now, what is the purpose of that? It is simply the foundation of their relationship begins then (SIC). They start in a drug culture doing drug business and then later on it flourishes in 1972. Peter Evans knows who to go to for a favor. He has done business with Thomas Evans and he found him to be a good partner, so he went there and asked him, do me favor (SIC), and he did. What else? (200).

The Court charged the jury on reasonable doubt thusly,

> ...the government, if the defendant is to be found guilty of any charge, has the burden of proving that the defendant is guilty of that

> charge beyond a reasonable doubt. As I told you this is a burden that never shifts. it remains upon the government throughout the entire trial. It remained with the defendant, or it was with him when the trial commenced, and this presumption of innocence will remain with him throughout this charge and even when you retire to the jury room to deliberate. (238).

Counsel objected to this portion of the charge as confusing the burden of proof on the government with the presumption of innocence. "I think the jury could have gotten the idea that that was a burden on the defendant" (269,268-270). The Court refused to clarify or correct the charge.

On accomplices the Court charged,

> Now, you realize, I am sure that in the prosecution of a crime the government is frequently called upon to use persons as witnesses who actually participated in the crime charged. These persons are called accomplices. Often it has no choice. This is particularly so in the cases of joint ventures. Frequently it happens that only the members of the arrangement have evidence which is relevant to and important in a case. If accomplices could not be used there are many cases where there is real guilt and where convictions would not be otherwise obtainable. During the course of the trial you heard the testimony of Thomas Evans, who testified concerning his involvment in the crimes charged. He is therefore an accomplice...Mr. Thomas Evans has also pleaded guilty. These facts, that is that he is an accomplice and that he has already pleaded guilty, do not disqualify him as a witness, but these facts may well affect the weight which you accord to his testimony. (243-244)

Counsel objected that this charge,"started out primarily almost as an apology for the government's position and the problems that the government faces in trying to prove a case like

this and having to rely upon accomplice testimony. It almost went like a second summation" (270-271). He also objected to the Court's charging as a matter of fact that Thomas Evans was an accomplice, a fact which should have been left to the jury to determine (271-272).

On the 1968 LSD transaction, the Court charged,

> You have heard testimony that in 1968 the defendant Peter Evans engaged in conversation with Thomas Evans in which Peter Evans admitted selling LSD tablets and at times going to California to obtain LSD tablets for the purpose of later selling those tablets in New York. Now, Peter Evans is not on trial before you in those alleged incidents. However, you may consider in determining whether Peter Evans acted in this case with guilty knowledge or intent, the fact, if you find it to be true, that Peter Evans engaged in other transactions in 1968 which are similar to those charged in the indictment. In other words, you consider such evidence only with respect to knowledge and intent, which is an element of each crime charged.
> (246)

The Court charged, "Now, Section 812 of that title defines 'controlled substances' to include the narcotic drug cocaine"(247). Counsel objected once again to the use of the word narcotic (272).

The Court read the first count of the indictment charging a conspiracy among the named defendants "and others to the grand jury unknown." (248). No proof was offered as to anyone but the named defendants.

In its charge on constructive possession, the Court states, "Such control may be demonstrated by the existence of a working relationship between the person having such control and the person with actual physical custody....(262).

The jury found appellant guilty on both counts (291), and on September 22, 1975, he was sentenced to a suspended 3 year prison term and 3 years probation.

ARGUMENT
POINT I

THE ADMISSION IN EVIDENCE OF THE IRRELEVANT, IMMATERIAL HEARSAY STATEMENTS OF THE JUDGE WHO SENTENCED THE "ACCOMPLICE" WITNESS AND OF THE UNITED STATES ATTORNEY WHO PROSECUTED HIM, VOUCHING FOR THE WITNESS' COOPERATION, CHARACTER, AND TRUTHFULNESS, AND EXPRESSING BELIEF IN APPELLANT'S GUILT, DEPRIVED APPELLANT OF HIS SIXTH AND FIFTH AMENDMENT RIGHTS TO CROSS-EXAMINATION AND FAIR TRIAL.

In a case which depended entirely on the credibility of the guilty pleading informant, co-conspirator witness, the admission in evidence of the out-of-court statement of the Judge who sentences this witness on his guilty plea to the effect that,

> You are an intelligent and extremely able young man. I would say from your IQ...you are a person who has potential...you have not realized that potential, but I would be optimistic enough to think you are still young enough...I believe that by admitting what you did by testifying as you did you deserve consideration...I hope that you can recognize that there are people in this society who may take advantage of you. You must recognize those and not permit them to do that.
>
> (110-113 and see minutes of May 4, 1973),

and the admission in evidence of the out-of-court statements of a United States Attorney that this witness had cooperated, "as fully as his position in this incident made possible," that the witness had testified in the grand jury and had agreed to testify at the instant trial and presumably told the truth to the prosecutor's satisfaction, deprived appellant of his rights to cross-

examination and fair trial.

These hearsay statements, contained in the sentence minutes of the witness, which minutes were requested and received by the jury during their deliberations, told the jury that 1) a Federal District Judge believed the witness was telling the truth about the events testified to at trial, that 2) a Judge had already found the witness' story to be the truth and had based his sentence leniency on that finding, that 3) a Judge had believed the witness to be of basically good character, "an extremely able young man...who has potential "about which the Judge was "optimistic," that 4) the Judge believed the witness' description of the events to the effect that the witness had been "taken advantage of" by others in this conspiracy, i.e, that appellant was the real evil doer in this case, that 5) the prosecutor had also believed the witness in that he was satisfied with the witness' cooperation which coincided with the witness' actual participation in the events and that 6) the witness had testified before a grand jury that had also believed him in returning the instant indictment. And, all of this prejudicial, irrelevant and incompetent evidence went to the jury without benefit of defense cross-examination. Thus, the evidence amounted tothe hearsay vouching opinions of the Court and prosecutor on the ultimate issue in the case, and, as such, was so prejudicial as to require a new trial. No rule of evidence permits, or has ever permitted, lay opinion evidence to the effect that a witness in the proceeding at hand is or is not telling the truth about the events on trial. Even expert

paychiatric testimony on the general truth-telling tendencies of a witness is usually excluded. United States v. Pacelli, 2d Cir., July 24, 1975, Slip Op. 5087. This is an issue not peculiarly within a special expertise, and often, as in this case, it is the ultimate issue which the jury must decide. "The jury is the lie detector in the courtroom." United States v. Barnard, 490 F.2d 907 (9th Cir., 1973) (emphasis supplied). United States v. Angello,452F.2d 1135 (2d Cir., 1971) cert. den. 406 U.S. 922; Michelson v. United States, 335 U.S. 469 (1948); United States v. Spaulding, 293 U.S. 498, 506 (1935); United States v. Phillips, 478 F.2d 743, 746 n. 6 (5th Cir., 1973); United States v.Grunberger, 431 F.2d 1062 (2nd Cir.1970)

> There is a kind of statement by the witness which amounts to little more than an expression of his belief as to how the case should be decided...or as to the credibility of certain testimony. Such extreme expressions as these all courts, it is believed, would exclude. There is no necessity for such evidence, and to receive it would tend to suggest that judge and jury may shift the responsibility for decision to the witness.
>
> McCormick, Evidence, §12 (1954) p.25

This kind of testimony, as objectionable as it is in general, is all the more so coming from the District Judge and the United States Attorney who had the responsibility for sentencing and prosecuting Thomas Evans. As this Court has said,

> The jury might have received the impression that the judge believed Berger's version of the facts to be the more plausible of the two versions. As has often been said, 'the influence of the trial judge on the jury "is necessarily and properly of great weight" and

> "his lightest word or intimation is received with deference, and may prove controlling."' Quercia v. United States, supra at 470, 535 S.Ct. at 699. Moreover, instructions given in the charge to the jury that they are the sole judges of the credibility of the witness cannot remove the impression so created. United States v. De Sisto, supra, 289 F.2d at 835... The judge, therefore usurped the function of the jury as a fact finder and allowed his view, the prosecution view, of the sharply disputed purport of this evidence to be the only view the jury should consider...
>
> [and the prosecutor] was speaking as an expert based upon matter outside the record. That this remark was improper is beyond dispute.
>
> United States v. Grunberger, 431 F.2d 1062, 1068-1069 (2d Cir., 1970)

See also United States v. Barash, 365 F.2d 395 (2d Cir., 1966) cert den. 396 U.S. 832. United States v. DeLoach, 504 F.2d 185 (D.C. Cir., 1974); United States v. Kemp, 504 F.2d 421 (6th Cir., 1974). The jury was in effect being given a prior factfinding on the witness' credibility, the ultimate issue, and was permitted to consider it without cross-examination by the defense. There is no better way to influence the jury because this tactic effectively takes the issue away from them. Abrams v. United States, 327 F.2d 898 (D.C. Cir., 1964); People v. Rosenfeld, 11 N.Y. 2d 290, 297-298 (1962); People v. Cioffi, 1 N.Y. 2d 70 (1956); People v. Malkin, 250 N.Y. 185 (1928). "The defendant has a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." United States v. Toner, 173 F.2d 140, 142 (3rd Cir., 1949); United

States v. Crosby, 294 F.2d 928, 950 (2d Cir., 1961) cert. den. 368 U.S. 984.

Finally, as objectionable as this testimony would have been had it been given at the instant trial, from the witness stand or from the Judges bench or the prosecutor's podium, here it was introduced in the hearsay form of prior transcribed ex parte statements. The same combination of hearsay opinion was condemned by this Court in United States v. Gruber, 123 F.2d 307, 310 (1941) (A. Hand,J).

> The objections to the rulings of the trial judge in declining to admit letters of the New York Attorney General and McCauley, and of the chairman and counsel for the S.E.C. commendatory of Gruber's work in the Attorney General's Office and with S.E.C. are without merit. At best they were hearsay evidence of the opinions of persons who were not called as witnesses and their admission would have deprived the government of its right of cross-examination.

Thus, the admission of this evidence, while offending the traditional rules of evidence designed to ensure appellant a fair trial, ultimately offends as well his Constitutional right to cross-examination. Pointer v. Texas, 380 U.S. 400 (1964); Dutton v. Evans, 400 U.S. 74 (1970); United States v. Frattini, 501 F.2d 1234 (2d Cir., 1974); United States v. Fiore, 443 F.2d 112 (2d Cir., 1971) cert. den. 410 U.S. 984; United States v. Barash, supra; United States v. Pacelli, 491 F.2d 1108, 1115-1118(2d Cir., 1974) cert. den. 419 U.S. 826.

Besides falling outside any exception to the hearsay rule, this evidence was incompetent and irrelevant for any purpose in the case. Ostensibly the government offered the sentence minutes of Thomas Evans to counter what it characterized as defense counsel's, "taint[ing] the judiciary in his cross-examination of the defendant [sic]," his "taint [ing] the office of the United States Attorney that something improper was done..." (111-112), and the Court admitted the evidence because it believed counsel was, "bringing out...the Court was somehow involved in this...as a part of an agreement with the government which I am sure is probably not true..." (107). First there is no such insinuation against the judiciary in counsel's cross-examination of the witness, for counsel himself made it clear to all concerned that he was asking the witness about deals and promises made to the witness by "the government," by AUSA Mukasey (105-106). Second, had counsel's cross-examination elicited answers from the witness suggesting an arrangement among the Court, the government and the witness, this would have been perfectly proper cross-examination. Proper or improper, however, this cross-examination could not have opened the door to hearsay opinion in the sentence minutes that the witness was telling the truth about appellant's involvement. Even if it be argued that the statements in the minutes were offered to evidence the Court's actual reasons for imposing the lenient sentence on Evans, they remain incompetent

hearsay to prove the truth of those reasons. And, even if it be argued that they were offered simply to evidence what sentence Evans actually received, they were irrelevant and incompetent, because Evans had already testified to the sentence he received, and the other extraneous hearsay opinions in the minutes about his truthfulness had nothing to do with the terms of the sentence.

According to the law, as stated by this Court, counsel was pursuing a totally proper line of cross-examination.

> The rule is that '[i] n attempting to establish the motives or bias of a witness against him, a defendant may...elicit evidence showing that the government made explicit promises of leniency in return for cooperation' United States v. Campbell, 426 F.2d 547, 549 (2d Cir., 1970)
>
> United States v. Blackwood, 456 F.2d 526, 531 (2d Cir., 1972) cert. den. 409 U.S. 863.

And, a judge may not interfere with this right to show witness motivation, just because the judge, or the prosecutor, believes that his integrity or the integrity of the judiciary is being impugned. United States v. Gonzalez, 488 F. 2d 833, 855n.2 (2d Cir., 1973). Reversible error is committed when the judge aborts proper cross-examination in an attempt to disuade the jury from accepting the impeaching evidence. United States v. Barash, supra. Thus, counsel's proper cross-examination did not open the door to the sentence minutes which had nothing to do with what he was getting at (United States v. Kahn, 472 F.2d 272, 279-280 (2d Cir., 1973) cert den. 411 U.S. 952; United States v. Robles-Rerez, 474 F.2d 1271 (9th Cir., 1973); United States v. Reid, 410 F. 2d 1223 (7th Cir., 1967)), and even if the door was

opened, it was opened to competent evidence only, which, for the reasons given, the sentence minutes were not. If the minutes were competent to show what sentence Evans received, the extraneous matter therein went far beyond the proof of this fact. Abrams v. United States, supra.

As has been argued, the admission of this evidence was prejudicial error because it bolstered the credibility of the very evidence attacked by appellant in his only line of defense, and the bolstering was done in such a way as to preclude a jury judgment in appellant's favor. The admission of hearsay bolstering is not harmless in a case where the prosecutor, as here, stressed the evidence in his summation to the jury (See Facts, supra and pp.201, 225 of the record),* and where, as here, the jury studied the prejudicial evidence during their deliberations. United States v. Frattini, supra. This was accomplice-corroborative evidence, and, as such, its improper admission was not harmless. Whitely v. Warden, 401 U.S. 560 (1971) (citing Chapman v. California, 386

* This summation, we submit, amounted to prejudicial misconduct in itself requiring reversal. The prosecutor commented on the failure of the defense to call Judge Ward and AUSA Mukasey when there was no such obligation on the defense, especially since the prosecutor misstated counsel's arguments and the testimony charging the defense with impugning the judiciary when the defense intended no such thing. The prosecutor testified in this summation, "We tell the Court what cooperation the defendant has given to government, and the rest is up to the Judge." (225) And he asked the jury to draw a negative inference against the defense for making proper objection to the Thomas Evans sentence minutes. United States v. Gonzalez, supra; United States v. Drummond, 481 F.2d 62 (2d Cir., 1973)

U.S. 18 (1967); Harrington v. California, 395 U.S. 290 (1969)); Holloway v. Wolff, 482 F.2d 110 (8th Cir., 1973); United States v. Wright, 489 F.2d 1181 (D.C. Cir.,1973); United States v. Scheffer 463 F.2d 567 (5th Cir., 1972) cert. den. 409 U.S. 984. The cocaine in this case was found on the premises of the accomplice witness and on the person of Debbie Mc Kinney; there was no evidence linking appellant to it other than the testimony of the accomplice and his girlfriend who also lived in the apartment, both of whom received leniency from the government* and both of whom had every reason to protect themselves. Had this hearsay judicial opinion evidence not been received, the jury may well have disbelieved Thomas Evans' testimony,and his girlfriend's corroboration alone could certainly not have saved it.

Counsel's vigorous objection to the admission of the evidence spoke to these issues. He argued the relevance point,that his cross-examination was directed at "government" promises, and the witness' motivations pursuant thereto (And, the witness had indeed responded affirmatively that he was told prior to trial that his probation would be shortened and his conviction eradicated). He argued the opinion-vouching point ("I just don't think he has the right to laud the character of this witness") and the hearsay point ("through Judge Ward's statements by culling out the parts he wants to read"(112)). It is true that counsel did not say the word "hearsay," and he did not develope these arguments as fully as presented here, but, "It would be hypertechnical to call the objections insufficient to preserve such a basic [Constitutional]

*The case against Evans' girlfriend was dismissed

claim as this on appeal." United States v. Fox, 403 F.2d 97, 101 (2d Cir., 1968) Furthermore, the Court was well aware of the defense position, and the objectionable nature of this evidence from the various viewpoints herein analysed was apparent from the context of the case and the hearsay-vouching nature of the evidence itself. United States v. Rodriguez, 465 F.2d 5 (2d Cir., 1974); United States v. Diggs, 497 F.2d 391 (2d Cir., 1974)cert. den. 419 U.S. 861; Federal Rules of Evidence, Rule 103 (a)(1). As the Supreme Court has recently held, "In view of the fact that petitioners did challenge the admissibility of the...testimony at trial, we think it was proper for the Court of Appeals to consider all grounds related to that underlying objection." Anderson v. United States, 94 S.Ct. 2253, 2259n. 5 (1974). In any case, even a general objection would suffice in this case because, "there appears no purpose whatever for which it could have been admissable..." 1 Wigmore, Evidence §18 (3d. Ed., 1940) at 332-338.

POINT II

THE COURT'S PRECLUSION OF CROSS EXAMINATION INTO THE DETAILS OF THE INFORMANT-CO-CONSPIRATOR WITNESS' DRUG DEALER WAY OF LIFE AND MEANS OF SUPPORT, HIS PSYCHIATRIC HISTORY AND MENTAL CAPACITY, AND THE EFFECTS OF HIS DRUG USE ON HIS PERCEPTIONS, DEPRIVED APPELLANT OF HIS RIGHTS TO CROSS-EXAMINATION AND FAIR TRIAL

While permitting the improper bolstering of the critical witness against appellant (See Points I and III, supra and infra), the Court below severely and prejudicially curtailed defense cross-examination of that witness. The drugs in this case were found in the witness' apartment, but the witness' direct testimony presented him as the dupe of appellant who was pictured as the real

drug dealer in the case. Counsel quite properly sought to show the jury that the reverse was true, that Thomas Evans was the major drug dealer, and he sought to show this through the years of Evans' gallavanting around the country without viable means of support. The Court, however, expressed irritation at counsel in front of the jury, summoned him to the bench and admonished him that he could perhaps ask Evans straight out if Evans were a major drug dealer, but could not establish this through inferences from detailed facts elicited from the witness. This curtailment of proper cross-examination of a critical witness, and this open hostility to counsel's line of examination was reversible error. In dealing with such a witness, this Court has always held that the defense must be accorded a wide lattitude in cross-examination, and the trial Court may not indicate to the jury its own disbelief in the impeaching evidence. United States v. Wolfson, 437 F.2d 862 (2d Cir., 1970); United States v. Persico, 305 F.2d 534 (2d Cir., 1962); United States v. Barash, 365 F.2d 395 (2d Cir., 1966) cert.den. 396 U.S. 832; United States v. Masino 275 F.2d 129 (2d Cir., 1960); United States v. Lester, 248 F.2d 329 (2d Cir., 1957). Counsel here had certainly not gone beyond proper bounds in delving into this subject, nor was he required to ask the direct question and be done with it. Davis v. Alaska, 94 S.Ct. 1105 (1974).

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply...It is the essence of a fair trial that reasonable lattitude be given the cross-examiner even though he is unable to state to the court what facts a cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.
>
> (Alford v. United States, 282 U.S. 687, 692 (1931)

The Court went much further in its improper interference with cross-examination in this case. It categorically precluded examination into the witness' history of psychiatric problems and the effects of his drug use on his perceptions, and it sealed his psychiatric records from defense view (after the government had full access to, and persual of them). The law is clear that it is improper to deny cross-examination on the powers of recollection of a drug user at the time he observed the events in question. Wilson v. United States, 232 U.S. 563 (1914); United States v. Masino, supra; United States v. Fowler, 465 F.2d 664 (D.C. Cir., 1972). And, the right to cross-examination has always included the right to explore the mental condition and capacity of the witness. United States v. Pugliese, 153 F.2d 497 (2d Cir., 1945) (L. Hand, J.); United States v. Hiss, 88 F. Supp. 552 (S.D.N.Y.

1950); Ramseyer v. General Motors, 417 F. 2d 859 (8th Cir., 1969); United States v. Allegretti, 340 F.2d 254 (7th Cir., 1964) cert. den. 381 U.S. 911; see also Sinclair v. Turner, 447 F.2d 1158 (10th Cir., 1971) cert. den. 405 U.S. 1048

> It is just as reasonable that a jury be informed of a witness' mental capacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth.
>
> United States v. Partin, 493 F. 2d 750, 762 (5th Cir., 1974).

In precluding this examination, the Court below relied on a government memorandum which cited inapposite facts and law. Having sought and received a ruling from the Court permitting it to prove through Evans' testimony a 1968 LSD conspiracy between Evans and appellant, the government made the astonishing argument that, "His hospitalization (at Mount Sinai and Long Island Jewish Hillside hospitals in 1967 and 1968) took place four years prior to the events at issue in this trial" (government memorandum at p. 4). And, with the knowledge that Evans was receiving treatment starting in 1973 at the Fifth Avenue Center as part of his probation requirements, the government, again apparently straight-faced, argued that his treatment took place "seven years before the present trial" (Ibid). The law cited by the government has nothing to do with the cross-examination right pertaining to mental history. The cited cases deal with the offer of expert testimony on the competency of the witness to tell the truth, and there is

no question but that the receipt of such evidence is discretionary with the trial judge (See Point I, supra). The Judge however, has no discretion to cut off completely the proper line of cross-examination on the psychiatric background of the critical witness in the case who has already given his direct testimony. Nor is it necessary that counsel, "state to the court what facts a reasonable cross-examination might develop." Alford v. United States, supra.

> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.
>
> (Ibid)

Indeed, it is difficult to see how counsel could make such an offer of proof when the facts of the witness' psychiatric history were sealed from his view. In any case, counsel had a good faith basis for "exploring" this issue in his cross-examination, and the Court was in error in stopping him.

Although we would argue that ultimately the sealed psychiatric records may well have been admissable in evidence (United States v. Partin, 493 F.2d 750 (5th Cir., 1974)),at the very least counsel was entitled to see them to make his own judgment as to what use might be made of them on cross-examination.

> In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecutor to have exclusive access to a storehouse of relevant fact....For this reason we cannot accept the view of the Court of Appeals that it is 'safe to assume' no inconsistencies would have come to light if the grand jury

> testimony had been examined. There is no justification for relying upon 'assumptions' ...Nor is it realistic to assume that the trial Court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.
>
> Dennis v. United States, 384 U.S. 855, 873-875 (1965).

POINT III

THE ADMISSION IN EVIDENCE OF AN UNCHARGED LSD CONSPIRACY, WHICH ALLEGEDLY OCCURRED FOUR YEARS PRIOR TO THE INDICTED COCAINE CHARGES, IN A CASE WHERE THE ONLY ISSUE WAS THE CREDIBILITY OF THE GOVERNMENT INFORMANT, WAS PREJUDICIAL ERROR DEPRIVING APPELLANT OF A FAIR TRIAL

The issue in this trial was whether or not Thomas Evans was telling the truth about appellant's involvement with quantities of cocaine found in Thomas Evans' apartment and on the person of Debbie Mc Kinney in September 1972. The defense contention was that Evans was not telling the truth and that appellant was not involved in these transactions at all. In the circumstances of this case, therefore, the prosecution's evidence that appellant had been involved with Thomas Evans four years earlier in an uncharged LSD sale conspiracy was only relevant for the very purpose prohibited by the law, "disposition, propensity or proclivity of [defendant] to commit the crime charged." United States v. DeCicco, 435 F.2d 478, 483 (2d Cir. 1970). Indeed, this was the express use made of the evidence by the prosecutor in his summation when

he argued to the jury, despite the total absence of any evidence of activity between appellant and Thomas Evans in the intervening four years,

> We have to go back to 1968...Peter Evans gave Tom some LSD...They talked about how to sell LSD...Peter had gone to California to get LSD. So this friendship, partly based on a drug culture, on a drug relationship began. That friendship continued into September, 1972 (192-193)...You have that relationship that begins in 1968. Now what is the purpose of that? It is simply the foundation of their relationship begins then (sic). They start in a drug culture doing drug business and then later on it flourishes in 1972...He had done business with Thomas Evans and he found him to be a good partner, so he went there and asked him, do me favor (sic) and he did. What else? (200).(emphasis added)

This argument, we submit, is a pure and simple propensity, drug-seller-character, argument: "They did it in 1968; they naturally did it again in 1972." Although this Court has adopted an inclusory rule of prior crimes evidence, it still precludes that evidence to prove propensity. United States v. Papadakis, 510 F.2d 287, 291 (2d Cir., 1975); United States v. DeCicco, supra. And, there was no proper issue to which this evidence could have been relevant because the case did not present those state-of-mind issues. Defendant's answer to the charges here was complete denial: "he didn't do it" as opposed to "he was there but didn't know or intend criminal acts." There was no entrapment claim here (United States v. Cohen, 489 F.2d 945, 950 (2d Cir.,1973)); no claim by the defendant that he was present but intended something

other than the crimes charged (United States v. Brettholz, 485 F.2d 483, 488 (2d Cir., 1973); no defense testimony to be rebutted (United States v. Cuadrado , 413 F.2d 633, 635 (2d Cir., 1969); and no state of mind testimony to be rebutted. United States v. Kaufman, 453 F.2d 306, 311 (2d Cir., 1971).

This case is on point with De Cicco, supra, where the main witness against the defendants gave his substantive testimony and then was permitted to testify about a prior similar act. This Court said,

> The defense's only hope in this case was to attack Paul Parness's credibility and thereby to raise a reasonable doubt about the veracity of his account of what the defendants did, or said...Therefore, whatever probative value the prior crimes...added to the prosecution's case on the issue of defendant's intent...was far outweighed by the unwarranted inference...that the defendants...were a continuing band of art treasure thieves and 'fencers'.
>
> 435 F.2d 478 at 484

Thus, it was not good enough for the purpose of the admission of this evidence that the Court below could say,

> the defendant in this case is charged with possessing cocaine with intent to distribute. He has entered a plea of not guilty...He has therefore put on issue his intent...Therefore, your objections to the admissibility of that evidence are overruled.
>
> (11-12).

A ruling like this would quite simply permit other crimes evidence in every criminal case without exception, and that is not the law according to De Cicco. When the real issue in the case is whether

or not the events actually happened, intent is subsumed in that issue, and prejudicial evidence of prior crimes has little or no real probative value in the case. United States v. Smith, 283 F.2d 760 (2d Cir., 1960)(Hand, J.).

What the government has done here is to prove multiple conspiracies while charging only a single conspiracy, with the hoped for spill-over effect doing the conviction-clinching job. This case is also on point with a case in this Circuit prohibiting this tactic. In United States v. Russano, 257 F.2d 712 (2d.Cir., 1968), the government charged named defendants with a narcotic conspiracy during the years 1951-1957. The government's proof, however, showed one conspiracy among the named defendants in 1952, and a second conspiracy among the same defendants in 1955 and 1956. The government produced no evidence of criminal activity by these defendants in the intervening years 1953 and 1954. This Court found a fatal variance and in reversing the convictions it said,

> If appellants had been tried only for the 1952 conspiracy the admission of evidence relating to the later conspiracy of 1955-56 would have constituted prejudicial error. Similarly, if they had been tried for the later conspiracy, evidence of earlier illegal acts would have been seriously prejudicial.
> 257 F.2d 715

We submit that this holding is controlling here in a situation where appellant was tried for a conspiracy in 1972, and where evidence of illegal acts in 1968, 4 years old with no additional evidence to show a continuing enterprise in the interim was intro-

duced against him. The jury was exhorted by the prosecutor to find a continuing enterprise when there was no evidence to support the argument, hence the prejudicial effect of an isolated prior criminal act used unproperly to prove criminal propensity. United States v. De Cicco, supra; United States v. Smith, supra.

POINT IV

THE COURT'S CHARGE WHICH MERGED AND CONFUSED REASONABLE DOUBT WITH THE PRESUMPTION OF INNOCENCE, WHICH INSTRUCTED AS A FACT THAT THOMAS EVANS WAS AN ACCOMPLICE, WHICH ADVOCATED THE GOVERNMENT'S USE OF ACCOMPLICE TESTIMONY, AND WHICH CALLED COCAINE A NARCOTIC DRUG, WAS ERRONEOUS

The Court charged on reasonable doubt, "this is a burden that never shifts. It remains upon the government throughout the entire trial. It remained with the defendant, or it was with him when the trial commenced, and this presumption of innocence will remain with him...." (238). When this error was called to the Court's attention it refused to clarify the instructions. The jury was thus left with, at best, confusing instructions on the very central rights of a defendant and duties of the government in a criminal trial. At worst, the jury was left with the impression that the defendant had some burden of proof of his own innocence beyond a reasonable doubt. A verdict resting on confused instructions on these central issues, should not be sustained, Bollenback v. United States, 326 U.S. 607 (1946), especially when considering the instructions as a whole, the jury may well have gotten the impression that the government's burden was reduced. United States v. Persico, 349 F.2d 6 (2d Cir., 1965); United States

v. Lawson 507 F.2d 433 (7th Cir., 1974); United States v. Guglielmini, 384 F.2d 602 (2d. Cir., 1967) cert. den. 400 U.S. 820; Cool v. United States, 409 U.S. 100 (1972).

The Court charged as a fact that Thomas Evans was an accomplice and that the government had no choice but to use him as a witness, especially in a "joint venture" case like this one where,

> Frequently it happens that only members of the arrangement have evidence which is relevant to and important in a case. If accomplices could not be used there are many cases where there is real guilt and where convictions would not be otherwise obtainable.
>
> (243-244).

We submit that this charge, in its length and substance, in effect, told the jury that Thomas Evans' story was the truth, that a joint venture had in fact taken place and that he in fact was an accomplice of appellant in this venture, and that he should be believed so that a conviction could be obtained. Although the Court cautioned the jury as to accomplice testimony, the preceding apology for its use and advocacy of its use "where convictions would not be otherwise obtainable," and its charge that Evans was in fact an accomplice, needlessly diluted and neutralized the cautionary instructions and deprived appellant of their full weight and effect. United States v. Gonzalez, 488 F.2d 833 (2d Cir.,1973) United States v. Balodimas, 177 F.2d 485, 487 '7th Cir., 1949); United States v. Beadon, 49 F.2d 164, 169 (2d Cir., 1931). In a case where the accomplice testimony was all, this objected-to charge was error requiring a new trial.

For the reasons stated in Point V, infra, the Court's charge that cocaine was a narcotic drug was also error requiring a new trial.

POINT V

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY REFERENCE TO COCAINE AS A "NARCOTIC DRUG" IN THE INDICTMENT, THE GOVERNMENT'S OPENING STATEMENT AND THE COURT'S CHARGE TO THE JURY

By all medical and pharmacological evidence, and by judicial decision (United States v. Castro 16 Cr.L. 2511 (D.C. N.Ill, 1975)), cocaine is not a narcotic drug.

Virtually every scientific and medical journal that has discussed the pharmacological classification of cocaine has concluded that cocaine is not a narcotic drug. The following is but a sampling of the textual conclusions supporting that statement and represents some of the leading scholarship on this subject:

> Cocaine: This drug is included as a narcotic under Federal and other laws but, unlike the opiates, it is a powerful stimulant and does not create tolerance of physical dependence. It is derived from the leaves of the coca plant cultivated exclusively in parts of South America. At present it is not the major drug of abuse that it once was.
>
> U.S. President's Commission on Law Enforcement and the Administration of Juctice, Task Force on Narcotics and Drug Abuse, p. 3; Washington, D.C. Government Printing Office, 1967

> The pure drug, cocaine (which is often confused with opium) was rather extensively abused in the United States during the early part of the century, and was included in the Harrison Narcotic Act for Control purposes although it is not a narcotic. In sharp contrast to depressant action of morphine, cocaine is a powerful stimulant.
>
> Proceedings White House Conference on Narcotic and Drug Abuse, p.285 (Sept. 27 and 28, 1963); Washington, D.C.,Government Printing Office, 1963

> Because it primarily flows through the black market, cocaine has been classified as a narcotic in Federal law, and is viewed as a hard drug. In fact, however, cocaine is a powerful stimulant and is not addictive in itself, which is the usual determinant factor for a narcotic drug.

Whitney North Seymour, Jr. (former U.S. Attorney), The Young Die Quietly (1972); pp. 150-51

> Though legally defined as a narcotic, under the law, cocaine is pharmacologically a stimulant.

Kaplan, Robert. Drug Abuse (1970), p. 38

> Cocaine is legally classified as a narcotic, but it is pharmacologically a "stimulant." Physical dependence and tolerance do not result from its use--and there are no withdrawal symptoms as there are with narcotics such as heroin.

Peter Marin & Allan Cohen, Understanding Drug Use (1971); p.99

> We are concerned primarily in this book with addiction to opiate drugs and their equivalents. These drugs are so completely different from such substances as marijuana and cocaine that they cannot intelligently be discussed together with them.

Alfred Lindesmith, The Addict and the Law (1965); p.ix

Thus there is no "actual rationality" for Congress' classification of cocaine as a narcotic drug, and the use of the word "narcotic" during a trial of one charged with cocaine possession has only the well recognized prejudicial effect of associating the crime charged with the crime of heroin sale and possession and the scourge of despair and evil associated with it. The use of the word "narcotic" is both medically and legally misplaced, having no relevance to the issues on trial and no basis in scientific fact. Counsel in this case did not seek that the federal

statute be declared unconstitutional or that the indictment be dismissed; he merely asked that the word not be used before the jury in any way. This request did not require the Court to decide whether, failing the "actual rationality" test, the law must fail or whether, passing the "rational basis" test, the law must pass. See United States v. Castro, 16 Cr.L. 2511 (.D.C.Ill., March 19, 1975). Rather, the Court was called upon to recognize that since the classification "narcotic" did indeed fail the "actual (scientific) rationality" test, the jury was being given a false impression as to the actual nature of the alleged crimes committed by appellant, and that since the word had no basis in fact as applied to cocaine, it was irrelevant and prejudicial for the purpose of use in a courtroom in front of a jury.

This argument must prevail, notwithstanding a judicial determination that Congress had a "rational basis" for classifying cocaine as a narcotic for penalty and regulatory purposes, i.e., that Congress had some other good reasons, like treaty obligations, or differences in opinion as to the ultimate societal harm of the drug, for so classifying cocaine. Since a jury is called upon to determine only the guilt or innocence of the accused, and may not concern itself with penalties or the validity of regulatory measures, the word "narcotic" should not have been before them, especially when these wholly legalistic, albeit absurd, distinctions are not made known to them. When a jury hears the word "narcotic", they assume its scientific and medical meaning, and would be sur-

prised to hear, we submit, that Congress may use the word without medical and scientific foundation, to mean something other than "narcotic" drug.

On these grounds, counsel moved on the first day of trial for the striking of the word "narcotic." Without further ado, the Court took one look at the indictment, saw the word "narcotic" therein, and in a word overruled counsel's objection. The Court did not ask for argument or evidence, but overruled the motion because it saw the word used in the indictment. Only at the end of the trial, realizing that perhaps it ought to have heard argument or evidence, did the Court "clarify" its reasons to the effect that the motion was untimely made and there was no evidence before the Court. We submit that the motion was timely made, and that had the Court wanted evidence in support of the motion, despite the overwhelming scientific authority of which the Court could have taken judicial notice, she could have ordered a hearing when the motion was made. In any case, the scientific conclusion that cocaine is not a narcotic drug is so universally accepted (See United States v. Castro, supra), that the only real issue before the Court when the motion was made was whether the word "narcotic" should be barred from use in the courtroom and before the jury for that reason. We submit that her decision to permit its use was prejudicial error requiring a new trial.

CONCLUSION

FOR THE ABOVE STATED REASONS THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted

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